

CALIFORNIA COASTAL COMMISSION

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Filed: March 5, 2003
49th Day: April 23, 2003
180th Day: September 1, 2003
Staff: ALB-LB
Staff Report: June 25, 2003
Hearing Date: July 9-11, 2003
Commission Action:

W 9h

STAFF REPORT: REGULAR CALENDAR

APPLICATION NUMBER: 5-03-091

APPLICANTS: City of Newport Beach and The Related Companies
(On behalf of the property owner, The Irvine Company)

AGENT: Dan Trimble, Program Administrator, City of Newport Beach

PROJECT LOCATION: Corner of Jamboree and Pacific Coast Highway,
City of Newport Beach, Orange County

PROJECT DESCRIPTION: Development of a senior affordable housing project and passive public park on a vacant 15-acre site. The senior affordable housing project will consist of 150 units in three 3-story buildings with a community center, administrative offices, a pool/patio area and 180 parking spaces on the lower 5 acres of the site. The park will contain a bike path, park benches and primarily native vegetation on the upper 10 acres. Approximately 115,000 cubic yards of grading (75,000 c.y. cut, 40,000 c.y. fill, 25,000 c.y. export and 10,000 c.y. surcharge) is proposed for view enhancement from Pacific Coast Highway, drainage, slope stabilization and site preparation. The project also involves approval of a lot line adjustment, modifying the configuration, but not the size, of each parcel.

SUMMARY OF STAFF RECOMMENDATION:

Staff recommends that the Commission **DENY** the proposed development due to inconsistencies with Chapter Three policies of the Coastal Act, including Sections 30233 and 30251. The subject site is a vacant 15-acre property located between the first public road and the sea (Upper Newport Bay) in the City of Newport Beach. The applicant proposes to create a public park on the upper portion of the site and a senior affordable housing project on the lower portion. As proposed, the project would result in the fill of wetlands to serve an unallowable purpose, residential development. The proposed project would also require a substantial amount of landform alteration to accommodate the new development. Due to the siting constraints presented, the proposed development is too intense for the subject property. Feasible alternatives, such as reducing the size of the development, exist, thus adding further reason why the current proposal cannot be approved. The primary issues addressed in the staff report are wetlands fill, landform alteration, public access/parking, and water quality.

At the time of this staff report, the applicants are in disagreement with the staff recommendation and oppose any significant modifications to the project. According to the applicants, the project cannot be redesigned to avoid Commission designated wetland areas and to retain natural landforms while remaining "affordable" and meeting the City's housing needs. ***See the Executive Summary on page 3 of the staff report for a further explanation of issue areas and attempts at resolution.***

LOCAL APPROVALS: Newport Beach City Council approval of Use Permit No. 2003-003, Site Plan Review No. 2003-001 and Lot Line Adjustment No. 2003-011 and adoption of Mitigated Negative Declaration for Bayview Park and Senior Housing on February 25, 2003.

SUBSTANTIVE FILE DOCUMENTS:

City of Newport Beach Certified Land Use Plan (LUP); Circulation Improvement and Open Space Agreement (CIOSA); CIOSA Program EIR prepared by ASB Planning dated 1992; Mitigated Negative Declaration prepared by Civic Solutions, Inc. dated February 25, 2003; *Preliminary Geotechnical Investigation for the Newport Senior Lower Bayview Landing, City of Newport Beach, California*, prepared by NMG Geotechnical, Inc. dated December 18, 2002 and signed by T. Wright (CEG 1342) and K. Markouizos (RCE 50312); *Supplemental Geotechnical Investigation and Review of Rough Grading Plan for Proposed Bayview Senior Affordable Housing and Park Project, City of Newport Beach* prepared by NMG Geotechnical, Inc. and signed by T. Wright (CEG 1342) and K. Markouizos (RCE 50312), dated April 22, 2003; *Phase I Cultural Resources Investigation of the Bayview Landing Project Area* prepared by McKenna et al dated July 5, 2001; *Phase 1 Environmental Site Assessment* prepared by ENVIRON dated December 13, 2001; *Wetlands Delineation and Field Biological Evaluation* prepared by Robert 'Roy' van de Hoek dated April 6, 2003; Biological letter report prepared by Keane Biological Consulting dated March 21, 2003; *Jurisdictional Delineation of the Bayview Property* letter report prepared by Glenn Lukos Associates dated April 11, 2003; *Jurisdictional Delineation of the Bayview Property* letter report prepared by Glenn Lukos Associates dated April 11, 2003 (revised May 2, 2003); *Hydric Soils Investigation* prepared by Fuscoe Engineering dated June 17, 2003.

LIST OF EXHIBITS:

1. Vicinity Map
2. Assessor's Parcel Map
3. Plot Plan
4. Grading Plan, Landscaping Plan, Elevations and Floor Plans
5. Lot Line Adjustment
6. CIOSA EIR Vegetation Map
7. CIOSA Constraints Map for Bayview Landing
8. Plot Plan with Approximate Wetland Areas Depicted
9. Correspondence from Wetlands Action Network dated March 10, 2003
10. Correspondence from Dr. Jan Vandersloot dated March 10, 2003
11. Correspondence from Robert A. Hamilton to Jan Vandersloot dated April 4, 2003
12. Correspondence from Robert C. Speed dated May 5, 2003
13. *Wetlands Delineation and Field Biological Evaluation* prepared by Robert 'Roy' van de Hoek dated April 6, 2003
14. Correspondence from Keane Biological Consulting dated March 21, 2003
15. Memorandum from David Bramlet to Keane Biological Consulting dated March 17, 2003
16. Letter Report prepared by Glenn Lukos Associates dated April 11, 2003 with Exhibits 3 & 4 only
17. Letter Report prepared by Glenn Lukos Associates dated April 11, 2003 (revised May 2, 2003) with Exhibits 3 & 4 only
18. Memorandum from Tony Bomkamp, Glenn Lukos Associates, to John Dixon, CCC, dated May 11, 2003
19. Memorandum from Dr. John Dixon dated May 14, 2003
20. Cut/Fill Graphic prepared by C.W. Poss Inc. dated April 9, 2003
21. "Request for Postponement, Response to Staff Report, and Request for Resolution of Conflicts Under PRC § 30200 (b)" from City of Newport Beach dated June 5, 2003
22. *Hydric Soils Investigation* prepared by Fuscoe Engineering
23. Memorandum from Dr. John Dixon dated June 20, 2003
24. Recent Correspondence—One letter of opposition & one letter of support
25. Archaeological Site Locations

26. Site photographs

EXECUTIVE SUMMARY:

The subject site is a vacant 15-acre property located between the first public road and the sea (Upper Newport Bay) in the City of Newport Beach. The applicant proposes to create a public park on the upper portion of the site and a senior affordable housing project on the lower portion. Three wetland areas have been identified on the lower portion of the site. As proposed, the project would result in the fill of these wetlands to serve an unallowable purpose, residential development. The proposed project would also require a substantial amount of landform alteration to accommodate the new development. Due to the siting constraints presented, the proposed development is too intense for the subject property. Feasible alternatives, such as relocating the structures and/or reducing the size of the development, are available. However, the applicant maintains that the project cannot be redesigned to avoid wetland areas and to retain natural landforms while at once remaining "affordable" and maximizing the quantity of affordable units that can be built on the site.

This application was initially scheduled to be heard by the Commission at its June 11, 2003 meeting. However, on June 5, 2003, the applicant requested a postponement in order to respond to concerns raised in the staff report and to provide additional technical studies. The City's *"Request for Postponement, Response to Staff Report, and Request for Resolution of Conflicts Under PRC § 30200 (b)"* is provided as Exhibit 21.

The staff report has been modified from the version prepared for the June hearing to reflect and respond to new information provided by the applicant. Specifically, the Project Description, Section B (Wetlands) and Section D (Scenic Resources) have been updated to reflect a proposed redesign and additional information regarding the wetlands. The redesign includes a Restoration Program to increase the size and habitat value of Wetland #1, referred to as the "Swale." Another component contemplated in the redesign, which has since been removed from consideration by the applicant, is the relocation of Building 2 to reduce the amount of grading/landform alteration required in the center slope area of the site. A revised landscape plan has also been submitted which includes increased native vegetation and a natural drainage course along the slope. Lastly, a revised parking plan has been submitted, which includes twelve (12) public parking spaces within the senior affordable housing site and an assurance that additional public parking will be created along Back Bay Drive. Although these are positive changes, the project continues to raise issues regarding wetlands fill and landform alteration.

In addition to the redesign, the applicant has also provided information regarding the City's state mandated affordable housing requirements and funding sources for the proposed project. According to the City, the affordable housing project at Bayview Landing is necessary in order for the City to fulfill its housing requirements and gain approval of the Housing Element by the Department of Housing and Community Development (HCD). Although the provision of senior affordable housing is a beneficial land use in many instances, the Coastal Act prioritizes the protection of sensitive coastal resources over the construction of residential development. As such, the focus of the current analysis is on appropriate siting and sizing of the proposed development to avoid protected coastal resources.

Commission staff has had multiple telephone conversations and a meeting on June 24, 2003 with the applicants and their agents to discuss issues and possible resolutions to the outstanding conflicts. Commission staff appreciates the cooperation and effort put forth by the applicants. Unfortunately, significant issues remain unresolved. The primary point of disagreement involves the issue of wetlands fill. As part of the concessions offered by the applicant, Wetland #1 would be improved and enhanced; however, Wetlands #2 and #3 would be filled by the proposed surcharge of the lower portion of the site. As described by the applicant, the entire lower portion of the site must be surcharged with approximately 10,000 cubic yards of soil prior to construction. Without the soil surcharge, the lower site could not support the proposed development due to potential settlement issues. The applicant states that a much costlier foundation system (i.e.

caissons) would be required if the site were not entirely surcharged. Commission staff has recommended avoiding the wetland areas and their respective buffers during surcharge activities. The applicant asserts that such a process would be infeasible and maintains that the fill of *“these small, manmade wetlands”* (Wetlands #2 and #3) does not present a significant adverse affect on coastal resources. Additionally, the applicant questions the Staff Ecologist’s determination that the Road Rut (Wetland #2) and Upper Depressional Area (Wetland #3) should be characterized as wetlands.

Under Section 30233(a) of the Coastal Act, and as established by legal precedent, wetlands cannot be filled for residential uses. In addition, the creation of a restored wetland at Wetland #1 involves grading and alteration of the site. The applicant asserts that this constitutes a “restoration project,” which is an allowable use of wetlands under the Coastal Act. However, as the Swale is considered a component of the residential development, alteration of that wetland area is also unallowable. Therefore, staff cannot recommend approval of the project due to the proposed fill of wetlands for an unallowable use.

Staff continues to encourage the applicant to redesign the proposed residential component of the project to eliminate any development within the wetland or buffers areas. Development should also minimize landform alteration. However, these siting restrictions do not prohibit development of the entire property. Development can still occur, albeit with a more limited footprint or with a difference foundation system. At this time, the applicant has indicated that a redesign that avoids the wetland areas is infeasible.

I. STAFF RECOMMENDATION OF DENIAL:

Staff recommends that the Commission adopt the following resolution.

A. Motion

I move that the Commission approve Coastal Development Permit #5-03-091 for the development proposed by the applicants.

B. Staff Recommendation of Denial

Staff recommends a **NO** vote. Failure of this motion will result in denial of the permit and adoption of the following resolution and findings. The motion passes only by affirmative vote of the majority of the Commissioners present.

C. Resolution to Deny the Permit:

The Commission hereby denies a coastal development permit for the proposed development on the ground that the development will not conform with the policies of Chapter 3 of the Coastal Act and will prejudice the ability of the local government having jurisdiction over the area to prepare a Local Coastal Program conforming to the provisions of Chapter 3. Approval of the permit would not comply with the California Environmental Quality Act because there are feasible mitigation measures or alternatives that would substantially lessen the significant adverse impacts of the development on the environment.

II. FINDINGS AND DECLARATIONS:

The Commission hereby finds and declares:

A. PROJECT DESCRIPTION AND LOCATION

1. Project Location

The project site consists of two undeveloped parcels located at the northwest corner of Jamboree Road and Pacific Coast Highway (PCH) in the City of Newport Beach, Orange County (Exhibits 1 and 2). The site is located on the inland side of PCH, between the first public road and the sea (in this case, Upper Newport Bay). Upper Newport Bay is located to the west of the subject site, beyond the Newport Dunes Recreational Vehicle Park. The nearest vertical coastal access is available at the Newport Dunes.

The project site is surrounded by the Newport Dunes to the west, the Hyatt Newporter Hotel to the north, the Villa Point condominiums across Jamboree to the east, and the Promontory apartments across PCH to the south, as shown in Figure 1 on the following page.

The site consists of an upper terrace adjacent to PCH, a vegetated hillside and a lower level pad area adjacent to Back Bay Drive. In addition, there is a steep cliff face at the westernmost extension of the property between PCH and the Newport Dunes. The upper terrace was previously developed with a residence (1931-1947) and later a gas station (1968-1984). The lower pad area has been intermittently covered with gravel and used for temporary parking and a fruit stand. The site has also been altered in the past by road construction activities and the lower portion was used for disposal of dredged materials from Upper Newport Bay.



Figure 1

2. Project Description

The proposed project involves the development of a senior affordable housing project and passive park on a vacant 15-acre site (Exhibit 3). The senior housing development will be constructed on the lower 5 acres of the site and the public park will be created on the upper 10 acres of the site, as described below.

Housing

The senior affordable housing component will consist of 150 units in three 3-story buildings with a recreation/community center, administrative offices, an outdoor pool/patio area and 180 parking spaces. Project plans and elevations are included as Exhibit 4. The proposed structures will reach a height of 35' above finished grade. The structures will not exceed the height of the finished grade of the public park; therefore, they will not be visible from PCH. The structures will be visible from Jamboree, but view corridors toward Upper Newport Bay will be provided between the buildings.

Parking for the housing development will be provided in uncovered surface lots with 150 resident spaces and 30 employee/guest spaces. A reduced parking standard was applied based on the anticipated demand of the senior housing use. Also, twelve (12) public parking spaces will be provided within the housing site. Parking will be discussed in Section G.

All of the 150 units will be affordable, with 30 units at 50% of Area Median Income (AMI) and 120 units at 60% AMI. According to the applicants, AMI is \$70,000 based on 2002 figures provided by the County of Orange. All of the units will be age restricted with the residents being 55 years and older. The facility will not provide assisted living services.

Park

The upper area of the site is proposed as a primarily passive park, containing an asphalt bike path, park benches, fencing and landscaping. The park area will contain primarily native vegetation, including a coastal sage scrub mitigation area. Ornamental landscaping is proposed along the edges of the development area and at the intersection of Jamboree and PCH. Vegetation will be discussed in Section E.

The Water Quality Management Plan for the proposed project includes best management practices (BMPs) such as a detention basin, catch basin filters, biofiltration, common area efficient irrigation and education. The proposed detention basin is sited in the northwest corner of the site, within a Coastal Act defined wetland area. In addition to serving as a detention basin, the applicant proposes to restore and enhance this wetland area, as described in Exhibit 21. Wetland issues will be discussed in Section B. Water quality issues will be discussed in Section F.

Grading

Approximately 115,000 cubic yards of grading (75,000 c.y. cut and 40,000 c.y. fill, with 25,000 c.y. of export and 10,000 c.y. surcharge) is proposed across almost the entire project site. The applicants indicate that grading is necessary for slope stabilization, site preparation and drainage. The majority of cut will occur in the upper park area, with the lower housing site receiving a substantial amount of the resulting fill material. Excess material will be exported outside the Coastal Zone. According to the applicants' geotechnical consultant, the current grade of the lower housing site must be raised approximately 4'-5' due to soils conditions, the shallow water table and drainage concerns. Grading within the proposed park area is intended to improve views of the Upper Newport Bay from Pacific Coast Highway. Approximately 5'-10' will be cut from the upper terrace grade to create views through the site. Additionally, much of the grading is occurring in the center of the site to create a 2:1 slope to accommodate Building 2 of the senior housing development. Grading and geologic hazards will be discussed in Section C. Scenic resources and landform alteration will be discussed in Section D.

Lot Line Adjustment

The project involves approval of a lot line adjustment, modifying the configuration, but not the size, of each parcel (Exhibit 5). Pursuant to the Development Agreement described in the subsequent section, the upper portion of the site is to be dedicated to the City of Newport Beach for use as a public park and the lower portion is to be used for private development (in this case, the operation of the senior housing facility) and will remain in the ownership of The Irvine Company. The parcel to be dedicated to the City (Parcel A) is approximately 10 acres in size and currently includes a vegetated slope area located in the center of the site. The parcel to be developed with the residential structures (Parcel 1) is approximately 5 acres and includes the entire lower portion of the site. The proposed Lot Line Adjustment will result in City acquisition of the proposed detention basin site at the lower portion of the site and will create additional private developable area within the center slope area of the project site.

3. Prior Commission Action in Subject Area

On June 10, 1993, the Commission approved a development agreement between the City of Newport Beach and the Irvine Company, known as the Circulation Improvement and Open Space Agreement (CIOSA).¹ The Development Agreement affected nine sites within the Newport Beach coastal zone (the agreement affected eleven sites total within the City). The agreement provided the City with certain traffic improvements and increased open space area and the Irvine Company with certain development entitlements. The Bayview Landing site was included in the CIOSA.

The CIOSA outlined potential land use options for the lower portion of the Bayview Landing site, including 10,000 square feet of restaurant use, 40,000 square feet for health club use or 120 units of affordable senior housing if adequate visitor serving opportunities exist within the area. (The

¹ Pursuant to California Government Code Section 65869, a development agreement is not valid for any development project located in an area for which a Local Coastal Program (LCP) is required but has not yet been certified unless the Commission approves such a development agreement by formal Commission action. The City of Newport Beach Land Use Plan was certified by the Commission in May 1982; however, no implementation plan has ever been submitted. Therefore, no Local Coastal Program for Newport Beach has been certified to date.

applicant's current proposal includes 150 units, pursuant to a provision of the Housing Element, which allows a 25% density bonus for affordable units.) The upper portion of the site is designated for open space use. These land uses are consistent with the designations for the site provided in the certified LUP.

In the CIOSA EIR (1992), the Bayview Landing site was said to support "*relatively poorly developed localized sage scrub, introduced annual grassland and ruderal habitats.*" Exhibit 6 depicts on-site biological resources discussed in the EIR. The proposal for the Bayview site anticipated that the upper portion of the site would be dedicated to the City for open space/passive park use that would affect vegetation and habitat of low biological sensitivity. However, the EIR acknowledges that bluff stabilization/remediation work related to the development of open space uses and erosion control could impact some poorly developed coastal sage scrub. In addition, the grading necessary for creation of the view park within the open space area was determined to be substantial if the City chose to modify the grade of the site to expand views of Upper Newport Bay to park users and motorists on Coast Highway. The EIR determined that grading could also impact the coastal sage scrub. As concluded in the report, "*depending in the extent and location of bluff stabilization/remediation and grading in the open space areas, these activities could cause a significant adverse impact on the California gnatcatcher and its habitat.*" The report went on to say that introduced annual grassland is the dominant vegetative feature of the western half of the upper site and ruderal vegetation is found throughout the lower level portion of the lower site. No wetlands were identified at the lower Bayview Landing site in the CIOSA EIR.

The EIR identified four mitigation measures that would protect the biological resources in the open space area. First, Mitigation Measure #17 required that open space plans be prepared in consultation with a biologist who shall determine that such plans will not adversely impact sensitive resources. Second, Mitigation Measure #18 prohibited grading, stockpiling, and operation of equipment in connection with development of the lower portion of the site above the southern hillside 25-foot contour line (as shown in the Constraints Map, Exhibit 7). Mitigation Measure #24 required that coastal sage scrub or perennial native grasses be used for revegetation of graded areas. Mitigation Measure #25 restricted all non-emergency grading for bluff stabilization and remediation to the non-breeding season for the gnatcatcher.

4. Consistency with CIOSA

Though the proposed land uses are conceptually consistent with CIOSA, as previously noted, the current proposal contains components that are inconsistent with the mitigation measures cited above and with the site restrictions of the Commission approved Development Agreement. Specifically, the Development Agreement addendum included delineated "development envelopes" and defined "maximum extent of grading for non-public uses" lines, which the current proposal exceeds. In addition, Mitigation Measure #18 restricts grading above the 25-foot contour, while the current proposal includes extensive grading beyond the 25-foot contour, as will be discussed in Sections C and D. Lastly, the currently proposed project will also adversely impact sensitive resources, inconsistent with Mitigation Measure #17.

As explained in the Commission's findings in approving the Development Agreement, the purpose of Mitigation Measure #18 was to prevent disturbance of coastal sage scrub habitat present along the slope in the center of the Bayview Landing site. However, the applicants have stated "*the main intent of the 25' contour mentioned in Mitigation Measure #18 was to prevent a private developer from using the open space on top of the bluff for equipment activity and fill storage if and when the lower site was developed for commercial use. However, this was assuming that the upper and lower sites would be developed separately.*" The applicants also contend that the CIOSA EIR was a program EIR, and supplemental environmental analysis has been carried out to

evaluate impacts at a project-specific level. The City recently adopted a Mitigated Negative Declaration (MND) for the Bayview Park and Senior Housing Project. The MND concludes that coastal sage scrub replacement at a 4:1 ratio will reduce potential adverse impacts to a less than significant level.

As stated above, the Commission approved the CIOSA in June 1993, finding it to be consistent with the policies in Chapter 3 of the Coastal Act (Cal. Pub. Res. Code §§ 30200-265.5). The Commission is not a party to the agreement between the City and the Irvine Company, and consequently is not responsible for enforcing the Development Agreement. Furthermore, the Commission's approval of the agreement does not prevent it from approving alternative proposals that do not comply with the agreement (provided that they too are consistent with the Chapter 3 policies of the Coastal Act). The Commission notes that the current proposal appears to be inconsistent with the Development Agreement approved previously. Though the standard of review for the current proposal is Chapter 3 of the Coastal Act, the Commission's approval of CIOSA provides additional guidance on how the area should be developed.

At this time, the Commission has the opportunity to evaluate proposed development at the Bayview Landing site for its consistency with the Coastal Act at a more detailed level of analysis than what occurred during its consideration of the Development Agreement. The Development Agreement provided for future discretionary review at the coastal development permit stage. The Commission's findings in approving the CIOSA Development Agreement acknowledge, *"the development areas may be further limited at the coastal development permit stage based on new/more specific biological or geotechnical information."* As such, the current staff report evaluates the proposed project in light of new information.

B. WETLANDS

Section 30108.2 of the Coastal Act states:

"Fill" means earth or any other substance or material, including pilings placed for the purposes of erecting structures thereon, placed in a submerged area.

Section 30121 of the Coastal Act states:

"Wetland" means lands within the coastal zone which may be covered periodically or permanently with shallow water and include saltwater marshes, freshwater marshes, open or closed brackish water marshes, swamps, mudflats, and fens.

Section 30233 (a) of the Coastal Act states,

(a) The diking, filling, or dredging of open coastal waters, wetlands, estuaries, and lakes shall be permitted in accordance with other applicable provisions of this division, where there is no feasible less environmentally damaging alternative, and where feasible mitigation measures have been provided to minimize adverse environmental effects, and shall be limited to the following:

- (1) New or expanded port, energy, and coastal-dependent industrial facilities, including commercial fishing facilities.*

- (2) *Maintaining existing, or restoring previously dredged, depths in existing navigational channels, turning basins, vessel berthing and mooring areas, and boat launching ramps.*
- (3) *In wetland areas only, entrance channels for new or expanded boating facilities; and in a degraded wetland, identified by the Department of Fish and Game pursuant to subdivision (b) of Section 30411, for boating facilities if, in conjunction with such boating facilities, a substantial portion of the degraded wetland is restored and maintained as a biologically productive wetland. The size of the wetland area used for boating facilities, including berthing space, turning basins, necessary navigation channels, and any necessary support service facilities, shall not exceed 25 percent of the degraded wetland.*
- (4) *In open coastal waters, other than wetlands, including streams, estuaries, and lakes, new or expanded boating facilities and the placement of structural pilings for public recreational piers that provide public access and recreational opportunities.*
- (5) *Incidental public service purposes, including but not limited to, burying cables and pipes or inspection of piers and maintenance of existing intake and outfall lines.*
- (6) *Mineral extraction, including sand for restoring beaches, except in environmentally sensitive areas.*
- (7) *Restoration purposes.*
- (8) *Nature study, aquaculture, or similar resource dependent activities.*

Section 30250(a) of the Coastal Act states, in pertinent part,

New residential, commercial, or industrial development, except as otherwise provided in this division, shall be located within, contiguous with, or in close proximity to, existing developed areas able to accommodate it or, where such areas are not able to accommodate it, in other areas with adequate public services and where it will not have significant adverse effects, either individually or cumulatively, on coastal resources.

As described previously, the applicant proposes to develop the subject site with a senior affordable housing project on the lower 5 acres and a public passive park on the upper 10 acres. The environmental document (Bayview MND) utilized to approve the project at the local level determined that no wetlands exist on the subject site. However, through subsequent review, areas that constitute wetlands under the Coastal Act have been identified within three sections of the lower portion of the site. Components of the proposed development, including one of the residential structures, the entry driveway, and the detention basin, are sited within these wetland areas (Exhibit 8).

One of the main reasons for preserving, expanding, and enhancing Southern California's remaining wetlands is because of their important ecological function. First and foremost, wetlands

provide critical habitat, nesting sites, and foraging areas for threatened or endangered species. Wetlands also serve as migratory resting spots on the Pacific Flyway a north-south flight corridor extending from Canada to Mexico used by migratory bird species. In addition, wetlands serve as natural filtering mechanisms to help remove pollutants from storm runoff before the runoff enters into streams and rivers leading to the ocean. Further, wetlands serve as natural flood retention areas.

Another critical reason for preserving, expanding, and enhancing Southern California's remaining wetlands is because of their scarcity. As much as 75% of coastal wetlands in southern California have been lost, and, statewide up to 91% of coastal wetlands have been lost.

The Coastal Act defines wetlands as “...lands within the coastal zone which may be covered periodically or permanently with shallow water....” The more specific definition adopted by the Commission and codified in Section 13577(b)(1) of Title 14 of the California Code of Regulations defines a wetland as, “...land where the water table is at, near, or above the land surface long enough to promote the formation of hydric soils or to support the growth of hydrophytes....” In discussing boundary determinations, the same section of the Regulations specifies that wetlands have a “predominance” of hydrophytic cover or a “predominance” of hydric soils. Although the definition is based on inundation or shallow saturation long enough for anaerobic reducing conditions to develop within the root zone², in practice hydrology is the most difficult wetland indicator to demonstrate. In California, a predominance of hydrophytes or a predominance of hydric soils is taken as evidence that the land was “wet enough long enough” to develop wetland characteristics.

Correspondence regarding biological resources of the subject site, specifically the presence of wetlands, has been received from the Wetlands Action Network (WAN), Jan Vandersloot, Robert Hamilton and Robert Speed (Exhibits 9-12). In addition, Robert Roy Van de Hoek submitted a *Wetlands Delineation and Field Biological Evaluation* dated April 6, 2003 (Exhibit 13). The WAN letter asserts that the biological resources report prepared for the MND contains incomplete surveys of the site and did not include an evaluation of the lower 5-acre portion of the site or the upper cliff areas. As such, it asserts, the potential wetland areas of the lower portion were not recognized. The WAN letter also states that many plant species (on both the upper and lower portions of the site) were not identified in the report. Correspondence from Jan Vandersloot echoes these concerns and identifies a number of others, including inadequate coastal sage scrub mitigation, coastal landform alteration, archaeology, vernal pools at the bluff top mesa and meadow, and public parking. The biological review letter prepared by Robert Hamilton focuses on native vegetation issues, but also describes the potential wetland areas and suggests “a proper wetland delineation be conducted...” The letter from Robert Speed describes the site as “the last unprotected open space on the Upper Bay estuarine margin” and urges that the site be returned to its original condition as a “wetland margin and natural coastal habitat.” The Van de Hoek report finds “three areas of definitive wetland in the 5-acre lower portion of Bayview Landing” and discusses the hydrology, vegetation, size and dominance of each. These are shown in Exhibit 13, page 21.

² As demonstrated by the definitions of hydric soils and hydrophytes: “A hydric soil is a soil that formed under conditions of saturation, flooding, or ponding long enough during the growing season to develop anaerobic conditions in the upper part.” National technical committee for hydric soils, October 18, 1994; A hydrophyte is, “Any macrophyte that grows in water or on a substrate that is at least periodically deficient in oxygen as a result of excessive water content....” Environmental Laboratory. 1987. Corps of Engineers Wetland Delineation Manual. U.S. Army Corps of Engineers, Washington, D.C.

Keane Biological Consulting, the biological consultant that evaluated the site for the MND, prepared a response to the WAN letter dated March 21, 2003 (Exhibit 14). The letter refutes the statement that the lower site and cliff areas were not surveyed and cites references in the report intended to describe those areas. The Keane letter states, "*the site supports no wetland soil or wetland hydrology, it is not currently associated with the wetlands of Upper Newport Bay, and it has no hydrologic source or high groundwater table to support wetlands.*" Nonetheless, the Keane letter also references a subsequent survey of the site conducted by David Bramlet, a local botanist with wetland experience. Bramlet found two "ephemeral wetlands" on the site, as described in his memo to Keane dated March 17, 2003 (Exhibit 15).

The applicants later retained Glenn Lukos Associates, biological consultants, who also evaluated the wetlands in a report dated April 11, 2003 (Exhibit 16). As stated in that report,

In the lower portion of the site, two areas were identified that exhibit the characteristics of wetlands as defined by the CCC. These areas included the settling basin and the road rut areas. Both of these features exhibit evidence of standing water or soil saturation, as well as hydric soils and a predominance of hydrophytic vegetation. The sizes of these areas are approximately 400 and 750 square feet, respectively.

The Commission's Ecologist/Wetlands Coordinator reviewed the April 11, 2003 report and noted that the delineation did not include a map showing areas having a preponderance of wetland indicator species, resulting in a potentially smaller representation of the actual wetland areas. A subsequent Glenn Lukos report dated May 2, 2003 was submitted for Commission review (Exhibit 17). In that report, the consultants provide a revised wetland map and photographs to document the topography, vegetative communities and general widths of each of the waters. In the report, the consultants acknowledge "*an additional area was identified following the April 15 storm event, which may be defined as wetland by the CCC.*" However, in subsequent correspondence (Exhibit 18), the consultants state,

In summary, it is our position that those portions of the basin that lack hydric characters in the soil and also are not able to hold water for more than seven days should not be considered a wetland. The area around the willows with redox in the soil meets the minimum test for wetlands. The upper basin lacks wetland hydrology because it is not capable of ponding water for sufficient periods, a fact that is confirmed by a complete absence of redox in the soil. The presence of opportunistic annual species is not sufficient in our opinion, given the range of conditions that all of these species can tolerate. Finally, while the road rut exhibits hydrology, hydric characteristics in the soil, and the same suite of opportunistic, highly adaptable annuals, it is not appropriate to designate it as a wetland, since it is only because of regular vehicular traffic, in an established parking lot maintained to serve an operating produce stand, that created the depression and compacted the soil.

After visiting the site on April 30, 2003 and reviewing all technical documents submitted by the applicant and others, the Commission's Ecologist/Wetlands Coordinator prepared a memorandum to district staff dated May 14, 2003 (Exhibit 19). As described in the memorandum, three areas at the Bayview site were characterized as having a preponderance of hydrophytic vegetation. These were designated as 1) Settling Basin and Swale, 2) Road Rut, and 3) Upper Depressional Area in Exhibit 3 of the May 2, 2003 Glenn Lukos report (Exhibit 17, page 17). Portions of the "Settling

Basin" and "Road Rut" exhibited all three wetland parameters: hydrophytic vegetation, hydric soils, and wetland hydrology. All three include a preponderance of hydrophytic vegetation. Therefore, applying the Commission's definition of a wetland, all three sites on the Bayview Landing site meet the definition of a wetland. A subsequent mapping would be necessary to establish the precise boundary of each area.

A supplemental survey was conducted by Fuscoe Engineering to determine the hydric soil condition for the three "observation" sites. The results of their assessment were submitted as a *Hydric Soils Investigation* dated June 17, 2003 (Exhibit 22). The Hydric Soils Investigation concludes that the soil in the willow site (Wetland #1) meets the hydric soils definition, because the soil is frequently ponded longer than 7 days during the growing season, but concludes that the soils in the other sites (Wetlands #2 and #3) do not meet the definition of hydric soil. The Commission's staff ecologist reviewed the new information, but concluded in a memorandum dated June 20, 2003 (Exhibit 23), "...the information in the Fuscoe Engineering report does not provide a basis for altering the conclusions presented in my memo to you of May 14, 2003." As such, the Commission maintains that all three areas meet the Coastal Act definition of wetlands.

As explained in the May 14, 2003 memorandum, the three wetland areas do not appear to be natural features. The areas were probably created by human activities and have not developed the important resource values generally associated with natural wetlands. No sensitive species appear to be reliant upon them. Nevertheless, these areas qualify as wetlands by the Commission's definition and must be treated in accordance with the provisions of Section 30233 of the Coastal Act. In addition, Section 30250 of the Coastal Act requires that new residential development be located where it will not have "*significant adverse effects, either individually or cumulatively, on coastal resources.*" In this case, the development would have significant adverse effects on the designated wetland areas since two of the wetlands will be eliminated and the third will be converted into a detention basin. Moreover, the cumulative impact of development such as this (development that degrades or displaces wetlands) would have a significant impact. Consequently, the development must be redesigned to avoid such impacts through wetland preservation and the establishment of buffers. In view of the relatively degraded nature of these wetlands, the Staff Ecologist concludes "*25-foot wide buffers would be amply protective if the buffers were planted with native vegetation appropriate to the area and invasive exotics removed from the wetlands and buffers.*" Buffers provide essential open space between development and coastal resources, such as wetlands. Buffers, by separating development (such as the senior affordable housing) from wetlands, will minimize the adverse effects of the development on the wetlands, thereby avoiding significant adverse effects to resources.

As compared to the June 2003 proposal, the applicants have redesigned the project to include restoration and enhancement of the "Settling Basin and Swale." Plans for restoration have been submitted through an "Illustrative Example of Water Quality and Wetlands Restoration," which is included in Exhibit 21. In this proposal, the Settling Basin area would be used as a detention basin to serve as a water quality best management practice (BMP), while also providing "*valuable wetland habitat restoration.*" In order to address water quality impacts, the detention basin is a necessary component of the proposed residential development. The entire wetland area would be graded and substantially altered to function as an effective detention basin. Mechanized equipment would be utilized to enlarge and deepen Wetland #1. The applicant asserts that the "Water Quality and Wetlands Restoration" of Wetland #1 is allowable, as it serves a "restoration purpose," one of the eight allowable uses for wetlands. (Water quality will be discussed in Section F.) Although enhancement and enlargement of the wetland area is encouraged, use of

the wetland as a detention basin to treat runoff from a residential development is not considered an allowable use of a wetland pursuant to Section 30233(a) of the Coastal Act. The applicant's proposed "Water Quality and Wetlands Restoration" is not the principal use of the project. The principal use is the residential development. As such, the proposed development is unallowable.

Although the applicant is willing to improve and enhance the habitat value of the Settling Basin wetland area, the applicant would not be willing to avoid development in the Road Rut and the Upper Depressional wetland areas. Fill of the Road Rut and Upper Depressional wetland areas for residential development is not allowable, regardless of the types of improvements proposed at the Settling Basin wetland site. Additionally, total loss of two on-site wetlands cannot be considered the least environmentally-damaging feasible alternative, even if higher value habitat is created at one of the three sites. The on-site wetlands clearly are degraded. The degraded nature of the wetlands does not provide a basis to justify filling them. The entire lower parcel is five acres. Development of the parcel is possible without impacting the wetland habitat if a smaller footprint is used and appropriately sited. Retention of the existing wetlands is thus a feasible alternative and would be less environmentally-damaging than elimination of two of the three wetland areas. In addition, protection of all three wetland areas would be consistent with the State's "no net loss" policy, intended to prevent further loss of wetland acreage.

As stated above, Section 30233 of the Coastal Act allows the diking, filling, or dredging of open coastal waters, wetlands, estuaries, and lakes for eight enumerated purposes where there is no feasible less environmentally damaging alternative, and where feasible mitigation measures have been provided to minimize adverse environmental effects. In this case, the applicants propose the filling of three wetland areas to serve residential development. Residential development is not an allowable use of a wetland area. In addition, even if the fill were intended for an allowable use, the proposed project is not the least environmentally-damaging feasible alternative available. Lastly, if the wetlands fill was proposed for an allowable use and was determined to be the least environmentally-damaging alternative, a finding would have to be made that feasible mitigation measures have been provided. Mitigation for wetlands impacts typically requires a 4:1 replacement. Even if the fill was proposed for an allowable use, the proposed restoration project does not meet the typical 4:1 mitigation requirement. Therefore, the Commission finds the project inconsistent with Section 30233 of the Coastal Act and the project must be denied.

C. GEOLOGY

Section 30253 of the Coastal Act states:

New development shall:

(1) Minimize risks to life and property in areas of high geologic, flood, and fire hazard.

(2) Assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area or in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs.

The project application proposes approximately 115,000 cubic yards of grading (75,000 c.y. cut and 40,000 c.y. fill, with 25,000 c.y. of export and 10,000 c.y. surcharge).³ Essentially the entire

³ Data provided in the supplemental geotechnical report anticipates 82,700 cubic yards of raw cut and 29,200 cubic yards of raw fill, inconsistent with the figures provided in the application.

site will be subject to some form of earthwork, with the majority of cut/excavation occurring in the upper park area and the lower housing site receiving a substantial amount of the resultant fill material. Export material will be taken to the Big Canyon Country Club, located outside the coastal zone. Grading of the upper area is intended to improve views of the Upper Newport Bay from Pacific Coast Highway. The applicants also indicate that grading is necessary for site stabilization and to improve drainage along the upper slope. Much of the grading is occurring to create a 2:1 slope in the center of the site to accommodate one of the residential buildings. Additionally, with the proposed foundation system, a substantial amount of surcharge is necessary to mitigate the potential for liquefaction on the lower portion of the site. An alternative foundation system (i.e. caissons) would avoid or minimize the need to surcharge. The lower portion of the site will be raised an average of four feet. The applicants state that the areas being grading are highly altered and are not natural landforms or bluffs.

To assess the feasibility of the project, the applicant submitted the *Preliminary Geotechnical Investigation for the Newport Senior Lower Bayview Landing* prepared by NMG Geotechnical, Inc. However, the grading plans were modified subsequent to the geotechnical consultant's review of the project. (The City Council modified the amount of grading allowed on the upper portion of the site at their February 25, 2003 hearing.) At the request of the Commission's Geologist, the applicants' consultant provided a supplemental geotechnical investigation and review of the rough grading plan for the proposed project. In addition, the consultant provided a cut/fill map to more clearly illustrate the proposed grading activities (Exhibit 20). As outlined in the NMG report, the project consists of the following grading activities:

- ◆ *The proposed rough grading of the Lower Bayview (housing) site generally consists of design cuts ranging from 1 to 40 feet and design fills ranging from 1 to 7 feet above the existing grades. The majority of the design cut is located in the Building 2 area.*
- ◆ *The proposed rough grading of the Upper Bayview (park) site generally consists of design cuts ranging from 1 to 5 feet and design fills ranging from 1 to 7 feet.*
- ◆ *A north facing 2H:1V cut slope, up to approximately 40 feet high, will be graded between the senior housing site and the park site.*
- ◆ *Smaller 2H:1V to 5H:1V cut and fill slopes area planned along the perimeter of the site.*
- ◆ *The park will have a paved bike trail, but generally is considered to be a nonstructural area.*
- ◆ *The plan includes pad elevation, top-of-curb elevation, pad and street dimensions and storm drain (alignment only)*
- ◆ *The detention basin is approximately 3 feet deep and has 4H:1V side slopes. The onsite storm drain system outlets into the detention basin.*

The Commission's Geologist has reviewed the grading plans, geotechnical investigations and supplemental slope stability analyses for the proposed development and concluded the project to be acceptable from a geologic hazard standpoint. In the analysis, the staff geologist acknowledges the large quantity of grading and states, *"The majority of this grading is necessary to accommodate building 2; if the project consisted only of buildings 1 and 3, much less grading would be necessary. The grading proposed is not primarily for the creation of views, but is necessary to mitigate for the presence of unsuitable fill materials, to prevent differential settlement across the cut/fill boundary beneath building 3, and to mitigate for the liquefaction hazard."*

The geotechnical investigations conclude that the proposed project is feasible from a geologic hazard/engineering perspective. However, the proposed development cannot be accommodated given the constraints on the property without substantial earthwork and significant landform

alteration, including approximately 10,000 cubic yards of surcharge on the lower portion of the site. The massive amount of cut and fill proposed indicates that the project is too intense for the subject site. Less intense forms of development can be accommodated on site, which would avoid geologic hazard impacts as well as biological and scenic resource impacts.

Section 30253 of the Coastal Act states that new development shall minimize risks to life and property in areas of high geologic, flood, and fire hazard, and assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area or in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs. While the proposed project will not require the construction of protective devices, the project will require extensive grading that will alter the natural landform and affect the visual quality of the site. Therefore, although consistency with Section 30253 is not at issue, further analysis of the scenic resource impacts of the proposed landform alteration is necessary pursuant to Section 30251 of the Coastal Act.

D. SCENIC RESOURCES

Section 30251 of the Coastal Act pertains to visual resources. It states:

The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas, to minimize the alteration of natural land forms, to be visually compatible with the character of surrounding areas...

The project is located at the corner of two highly traveled coastal routes—Pacific Coast Highway and Jamboree Road. The site is also visible from the Newport Dunes Recreational Park, a popular visitor destination along the Upper Newport Bay. Because the new park and senior housing development would affect views inland from PCH and from a public access point, any adverse impacts must be minimized. Consequently, it is necessary to ensure that the development be sited and designed to protect views to and along this scenic coastal area and to minimize the alteration of existing landforms.

As shown on the Cut/Fill map (Exhibit 20), the topography of the entire site will be modified by the proposed project. The existing slope in the center of the site is approximately 40' high and supports coastal sage scrub. To accommodate a new building, the applicant proposes to remove 57,953 cubic yards of material from this center slope area with a maximum cut depth of 48 feet. The proposed cut will result in approximately 200 linear feet of excavation, thus "pushing" the landform away from the Upper Newport Bay.

As described previously, the CIOSA EIR found that grading could have a significant adverse impact on the coastal sage scrub and gnatcatcher habitat. The EIR included mitigation measures to avoid impacts to the area. These included a restriction of grading above the 25' contour. The current proposal includes grading far beyond the 25' contour, to approximately the 70' contour. The proposed excavation will remove the vegetated slope to create a buildable pad adjacent to a 2:1 slope. The slope will be replanted with coastal sage scrub vegetation. A naturalized water course with a rock outcropping will be incorporated within the coastal sage scrub planting area. Although some effort has been made to lessen the visual impact of the grading along the center slope, the project will still result in a substantial alteration of the character, and thus the scenic quality, of the natural landform.

In order to accommodate the grading necessary for the proposed residential building in the center of the site (Building 2), the applicants are proposing a lot line adjustment. The Lot Line Adjustment will shift the private development boundary over 100 feet to the south, thereby

privatizing the center slope area that is currently designated for public use in the certified LUP and the approved Development Agreement. In exchange, the public will acquire the proposed detention basin in the corner of the lower lot. This lot line adjustment will facilitate substantial alteration of a natural landform for a private purpose, thereby affecting the scenic quality of the site.

The project also involves the creation of a view park at the upper portion of the site. Grading is proposed which will lower the elevation of the surface to improve views of the Upper Newport Bay from Pacific Coast Highway. The project will require an average of 10' of cut (24,307 cubic yards) along the upper terrace. Although the views toward the Upper Newport Bay will be improved for motorists, concerns have been raised that the grading is excessive and will disturb existing native vegetation along the upper terrace. However, the applicant proposes to revegetate the terrace with coastal sage scrub. Vegetation disturbance at this site is not considered a significant adverse impact, as will be discussed in Section E. The view improvement created by grading of the upper terrace will benefit vehicular travelers and bicyclists along Pacific Coast Highway.

The project also involves approximately 26,346 cubic yards of fill to raise the grade of the lower portion of the site in order to accommodate the new housing development. The lower site will be raised 4'-5' from its current grade to mitigate liquefaction potential and stabilize the site. Not only does the proposed fill constitute landform alteration, it would destroy designated wetland areas for an unallowable use, inconsistent with wetland policies discussed in Section B.

The proposed project is incompatible with Section 30251 as it has not been sited and designed to prevent the need for substantial earthwork, which will alter the natural landform and degrade the available views and the visual quality of the area. A less intense form a development could be accommodated on site without the extent of landform alteration proposed, thereby preserving the natural features of the site. Therefore, the Commission finds the proposed project inconsistent with the visual resource protection policies of Section 30251 of the Coastal Act and must be denied.

E. ENVIRONMENTALLY SENSITIVE HABITAT AREA (ESHA)

Section 30240 of the Coastal Act states:

- (a) *Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas.*
- (b) *Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those habitat and recreation areas.*

The CIOSA EIR (1992) noted that the vegetation cover on the upper portion of the Bayview Landing site contained approximately 4 acres of "open, localized coastal sage scrub," and surveys at that time found one California gnatcatcher on the site. The EIR found that grading of the park site could have a significant impact on the coastal sage scrub and gnatcatcher habitat. As described previously, the EIR discussed mitigation measures to avoid impacts to the area. These included a restriction of grading above the 25' contour and timing of construction outside the potential gnatcatcher breeding season.

As part of the updated environmental analysis, the site was surveyed in 2001 to determine current conditions, potential impacts and appropriate mitigation measures. The survey found that the site is primarily covered by non-native vegetation and that small, non-contiguous fragments

(approximately ¼ acre total) of native coastal sage scrub exist. Focused surveys found no indication that gnatcatchers inhabited the site at that time. Nonetheless, the mitigation measure included in the Mitigated Negative Declaration and approved by the City for the proposed project require that existing fragments of coastal sage scrub be replaced at a ratio of 4:1. The City has recently offered to include an additional 0.5 acres of coastal sage scrub, for a total of 1.5 acres.

As indicated above, there is a dispute as to the quantity of coastal sage scrub (CSS) at the subject site. The 1992 EIR reported 4 acres and the biological report prepared for the MND reports ¼ acre. In correspondence received March 13, 2003 (Exhibit 10), Dr. Jan Vandersloot describes the CSS at the subject site and questions the underreporting in the MND. Dr. Vandersloot asserts that the CSS should be considered an Environmentally Sensitive Habitat Area (ESHA) because of its habitat value for the threatened gnatcatcher. As such, his letter concludes, *"No less than 4 acres of CSS should be replaced (not 1 acre as proposed by the City.)"* City staff responds that the difference is attributable to differing methodologies between the biologists. As stated in the City's "Response to Comments" included in the City Council Staff Report,

"There are two possible explanations for this discrepancy. The first is that the actual amount of CSS plants could have changed between 1992 and 2001 when the most recent survey was done. CSS plants could have either died naturally or been damaged or removed during weed abatement. Staff is not aware of any instances of illegal removal of CSS since 1992, however. Conversations with the City's biologist suggest that a more likely explanation is a difference in characterization of the vegetation cover by the two biologists. Both surveys noted that the CSS on this site was not high quality, and is mostly sparse or poorly-developed. Given these conditions, it is likely that any two biologists would differ in their mapping of vegetation types. It appears that the first biologists drew CSS boundaries broadly while the second biologist was more precise and identified only those areas actually covered by CSS plants."

The biologist who prepared the 2001 survey, Kathy Keane, indicated that she discussed her methodology and results with a US Fish and Wildlife Service biologist who was familiar with the site and that he agreed with her approach. It should be noted that USFWS will be the entity to review and approve the City's mitigation plan under the existing NCCP agreement. Required mitigation ratios are affected by the quality of the habitat, the location relative to other habitat areas, and the likelihood of success of the revegetation plan. Ratios ranging from ½ to 1 up to 3 to 1 are typical. The final determination of the acreage of CSS revegetation will be determined in consultation with the USFWS and the Coastal Commission."

If the CSS were determined to be ESHA, development that was not dependent on the resource and/or would significantly degrade the resource would be prohibited. As such, no mitigation would be necessary. The Commission's Ecologist has visited the site and determined that the coastal sage scrub does not rise to the order of ESHA. Therefore, the question of consistency with Section 30240 is not at issue. Nonetheless, if developed in the future, new landscaping surrounding the CSS mitigation area and the wetlands should consist of native drought-tolerant vegetation to enhance and improve the habitat value of the subject site. Non-invasive, non-native vegetation may be considered in the interior of the developed portion of the site.

F. WATER QUALITY

Section 30230 of the Coastal Act states, in pertinent part:

Marine resources shall be maintained, enhanced, and where feasible, restored.

Section 30231 of the Coastal Act states:

The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine organisms and for the protection of human health shall be maintained and, where feasible, restored through, among other means, minimizing adverse effects of waste water discharges and entrainment, controlling runoff, preventing depletion of ground water supplies and substantial interference with surface water flow, encouraging waste water reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of natural streams.

Section 30232 of the Coastal Act states, in pertinent part:

Protection against the spillage of crude oil, gas, petroleum products, or hazardous substances shall be provided in relation to any development or transportation of such materials.

Newport Harbor (Lower Newport Bay) is included on the Federal Clean Water Act 303(d) list of "impaired" water bodies for metals, pesticides and priority organics. The designation as "impaired" means the quality of the water body cannot support the beneficial uses for which the water body has been designated – in this case secondary contact recreation and aquatic uses. The listing is made by the California Regional Water Quality Control Board, Santa Ana Region (RWQCB), and the State Water Resources Control Board (SWRCB), and confirmed by the U.S. Environmental Protection Agency. Further, the RWQCB has targeted the Newport Bay watershed for increased scrutiny as a higher priority watershed under its Watershed Management Initiative. Consequently, projects which drain to Lower Newport Bay, should be designed to minimize or eliminate discharge of metals, pesticides and priority organics.

The applicant has submitted a comprehensive Water Quality Management Plan (WQMP) for the Bayview Landing site. The Best Management Practices (BMPs) contained in the WQMP are summarized below.

BMPs

- Essentially all of the runoff from the senior housing site and the majority of the runoff from the park will drain into grated catch basins located throughout the property. All catch basins will eventually drain to the detention basin.
- Detention basin:
 - will serve as a flood control and water quality device
 - the majority of the park site and all of the senior housing site will drain to the detention basin
 - low flow runoff will percolate into sandy soil at bottom of basin
 - the basin has been engineered to capture a 10 yr intensity, 24 hr duration event. To be conservative, the basin was sized without adding any benefit of percolation into the bottom of the basin. The basin is much larger than needed to capture and filter the first ¾ inch of rainfall ("first flush")
- Catch basin filters
 - all catch basin filters which intercept runoff from parking lot paved surfaces and building roofs will contain filtration devices (Kristar Fossil Filters).
- Filtration
 - surface runoff directed to landscaped areas and swales

- Common Area Efficient Irrigation
- Common Area Runoff-Minimizing Landscape Design
 - group plants with similar water requirements in order to reduce excess irrigation runoff and promote surface filtration
 - select plants that will minimize the need for fertilizer and pesticides
 - encourage the use of native and drought tolerant plants
- Energy dissipators
- Catch basin stenciling
- Education and Training
- Activity Restrictions
 - debris disposed in appropriate receptacles; not into streets and storm drains
- Common Area Landscape Management
 - water conservation; minimal pesticide and fertilizer use
- Common Area Litter Control
- Street Sweeping monthly
- BMP Inspection/Maintenance

In theory, the proposed water quality measures contained in the WQMP are sufficient to be deemed consistent with Sections 30230, 30231 and 30232 of the Coastal Act. However, because the WQMP depends on the creation of a detention basin in a defined wetland area to facilitate residential development, the project is inconsistent with Section 30233 of the Coastal Act and cannot be approved as proposed. In order to be found not only consistent with Section 30230, 30231 and 30232 of the Coastal Act, but ultimately approvable, the project must be redesigned to achieve the same water quality goals while avoiding wetland impacts. Therefore, the project, as submitted, must be denied.

G. PUBLIC ACCESS

Section 30252 of the Coastal Act states in pertinent part:

The location and amount of new development should maintain and enhance public access to the coast by...(4) providing adequate parking facilities or providing substitute means of serving the development with public transportation...

One of the strongest legislative mandates of the Coastal Act is the preservation of coastal access. Section 30252 of the Coastal Act requires that new development maintain and enhance public access to the coast by providing adequate parking or alternative means of transportation. When new development does not provide adequate on-site parking and there are inadequate alternative means of reaching the area (such as public transportation), users of that development are forced to occupy public parking that could be used by visitors to the coast. A lack of public parking and public transportation will discourage visitors from coming to the beach and other visitor-serving activities in the coastal zone. A parking deficiency will therefore have an adverse impact on public access. Until adequate public transportation is provided, all private development must, as a consequence, provide adequate on-site parking to minimize adverse impacts on public access.

The applicants propose two types of land uses on-site, residential and public recreation. The residential portion of the development will be served by 180 parking spaces in uncovered surface lots with 150 resident spaces and 30 employee/guest spaces. A reduced parking standard was applied based on the anticipated demand of the senior affordable housing use. Based on past operational characteristics and actual parking demand of other senior developments, the proposed parking ratio is 1.2 spaces per unit. The developer for the senior housing component of the project, The Related Companies, has developed other senior affordable housing projects in

the region and has utilized similar reductions in each. In addition, the maximum number of employees on site at any time would be three during the day (one for leasing, one for management, and one for maintenance) and one during the evening. This will not be an assisted living facility. The remaining 27-29 spaces would be used for guest/visitor parking.

Of the remaining guest parking spaces, twelve spaces (10 standard and 2 handicapped) are proposed to serve the new public park. An additional 8 on-street parking spaces will be provided along Back Bay Drive. City staff has indicated that the park is not considered a "destination" park; therefore, a low parking demand is anticipated. Although the site is primarily a passive park, there will be benches and a bike path traversing the site. Consequently, the public may choose to visit the site to enjoy the view or as a starting point for a bike ride. Therefore, it is important to provide sufficient parking and to inform the public of its availability. A signage plan has not been submitted.

The project provides parking that is sufficient to serve the public use of the park. Therefore, the question of consistency with Section 30252 is not at issue. Nonetheless, if developed in the future, appropriate signage must be provided.

H. CULTURAL/ARCHEOLOGICAL RESOURCES

Section 30244 of the Coastal Act states:

Where development would adversely impact archaeological or paleontological resources as identified by the State Historic Preservation Officer, reasonable mitigation measures shall be required.

The project site is undeveloped and due to its favorable location along the coast, may have been the site of pre-European occupation by Native Americans. Accordingly, it is possible that archeological/cultural deposits may exist on the site such as skeletal remains and grave-related artifacts, traditional cultural sites, religious or spiritual sites, or artifacts.

According to the Mitigated Negative Declaration, previous surveys identified two potential archaeological sites on or adjacent to the proposed project: CA-ORA-1098 and CA-ORA-66 (Exhibit 25). The cultural resources investigation found only shell scatter at both of these sites, and no artifacts were seen. The CIOSA EIR states that a high potential for the future discovery of significant fossils exists and that grading operations would be expected to unearth fossils.

The proposed project would include grading within the cultural and paleontological resources areas. Excavation for creation of the view park is proposed at the site of CA-ORA-66. Surcharge and construction is proposed at the site of CA-ORA-1098. Reducing earthwork would minimize potential disturbance to cultural and paleontological resources. Under any development plan, appropriate measures would have to be taken to ensure protection of such resources.

The Commission would, at minimum, consider the following requirements. In order to assure that development is undertaken consistent with Section 30244 of the Coastal Act, the Commission could find that written evidence must be submitted which demonstrates that the State Office of Historic Preservation has determined that no additional archeological surveys must be conducted prior to commencement of construction. Also, during the course of grading or other construction activities cultural resources could be uncovered. Therefore, the Commission could require that archaeological monitors qualified by State Office of Historic Preservation (OHP) standards and a Native American monitors appointed consistent with the standards of the Native American

Heritage Commission (NAHC) shall be present on the site during all project grading. If cultural deposits or grave goods (as defined by OHP) are uncovered during construction, the Commission could require that work must stop until the archaeological monitor and the Native American monitor can evaluate the site and, if necessary, develop a treatment plan approved by OHP and the Executive Director. Upon review of the treatment plan, the Executive Director would determine whether an amendment is required. If human remains are found, the Commission could require that the applicant carry out identification and require in-situ preservation, recovery or reburial (or a combination thereof) consistent with State Law and the wishes of the Native American Most Likely Descendent. The Commission could require, at minimum, the implementation of the above measures, in order to assure that the project would be consistent with Section 30244 of the Coastal Act. However, the Commission is denying the proposed project on other grounds and thus has not identified all of the measures that would be required in order to assure compliance with the Coastal Act.

I. ALTERNATIVES

Denial of the proposed project will not deny all economically beneficial or productive use of the applicant's property or unreasonably limit the owner's reasonable investment-backed expectations of the subject property. The LUP allows the lower portion of the site to be developed with a restaurant, health club or senior affordable housing. Those uses could still be accommodated on-site in a modified configuration. The applicant is left with various design alternatives to construct new structure(s) sited to avoid the wetland areas and reduce alteration of the landform. Among those alternatives are the following (though this list is not intended to be, nor is it, comprehensive of the possible alternatives):

1. **No Project**

No changes to the existing site conditions would result from the "no project" alternative. This alternative would result in the least amount of effects to the environment and would not have any adverse effect on the current value of the property. The senior housing component of the project could be sited elsewhere within the City. Alternative locations have already been identified by local officials.

2. **Redesign of Housing Project**

Residential development is not an allowable use of a wetland area. As such, any use of the area for a residential project must be redesigned to eliminate any development within the wetland or buffers areas. In addition, development must minimize landform alteration. These siting restrictions do not prohibit development of the entire property. Development can still occur, albeit with a more limited footprint. Any new proposals must be designed to avoid the wetland areas and to minimize grading of the slope in the center of the site.

A new housing proposal could be designed to accommodate the same number of residents in smaller units or a fewer number of residents in fewer units. New structures could also be designed with increased building heights along Jamboree. The Commission notes that views from PCH should be maintained; however, public views from Jamboree are less significant. Lastly, the project could be redesigned to utilize a different foundation system.

The applicant considered a revised site plan, which involved relocation of Building 2 and a reduction of 12 units (6 units from Building 1 and 6 units from Building 2). This design alternative would result in approximately 15,000 cubic yards less grading and less landform alteration; however, the wetlands would still be filled by the proposed surcharge activities.

The project currently proposes surcharge of the lower portion of the site to accommodate the new structures. The applicant has indicated that a different foundation system (i.e. caissons) would be cost prohibitive for an affordable housing project. However, a different foundation system would require less fill than currently proposed, thereby limiting potential wetland impacts.

3. Different Use of Site

Another alternative to the proposed project would be to develop the site with a restaurant or health club, as identified under the Development Agreement and certified LUP. Any proposed designs would have to respect the site restrictions identified in the current staff report. Uses other than affordable housing may require a smaller footprint area and be better accommodated on the subject site.

J. LAND USE PLAN

Section 30600(c) of the Coastal Act provides for the issuance of coastal development permits directly by the Commission in regions where the local government having jurisdiction does not have a certified local coastal program. Pursuant to Section 30604(a), the permit may only be issued if the Commission finds that the proposed development will not prejudice the ability of the local government to prepare a local coastal program which conforms with the Chapter 3 policies of the Coastal Act.

The Newport Beach Land Use Plan (LUP) was effectively certified on May 19, 1982. The proposed development is inconsistent with the policies of the certified Land Use Plan and Chapter 3 of the Coastal Act, specifically those relating to wetlands fill and landform alteration. Therefore, the Commission finds that approval of the proposed development will prejudice the City's ability to prepare a Local Coastal Program (Implementation Plan) for Newport Beach that is consistent with the Chapter 3 policies of the Coastal Act as required by Section 30604(a) and must be denied.

K. CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

Section 13096(a) of the Commission's administrative regulations requires Commission approval of coastal development permit applications to be supported by a finding showing the application, as conditioned by any conditions of approval, to be consistent with any applicable requirements of the California Environmental Quality Act (CEQA). Section 21080.5(d)(2)(A) of CEQA prohibits a proposed development from being approved if there are feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse effect which the activity may have on the environment.

As described above, the proposed project would have significant adverse environmental impacts. There are feasible alternatives or mitigation measures available, as described in the previous section, that would substantially lessen the significant adverse impacts which the activity may have on the environment. Therefore, the proposed project is not consistent with CEQA or the policies of the Coastal Act because there are feasible alternatives which would lessen significant adverse impacts which the activity would have on the environment. Therefore, the project must be denied.